passengers,[16] and a ferry boat in the service of the government-owned Canadian Railway[17] have both been held immune from seizure in English courts. These cases may not be in point for the reason that the English courts ordinarily do not distinguish between suits against a sovereign and those against his property, both being denied.[18]

The Lake Monroe is indicative of a broad attitude on the part of the Supreme Court towards our growing merchant marine. The existing law which has been characterized in an earlier article of this Review as "incomplete, confused, and unprepared to meet the problem, which has come to us together with our new merchant fleet"[19] has been radically changed. A class of vessels for which no one is responsible is not desirable.[20] A broad interpretation of section nine of the Shipping Act will allow but a small class of vessels to escape the liability now existing as to all privately owned ships.

G. H.

MINING LAW: LOCATIONS: PRIORITY OF CLAIMS: EQUITABLE DECREES.—The conclusion reached by the United States Supreme Court in the case of *Butte and Superior Copper Co. v. Clark-Montana Realty Co.*,[1] commonly referred to as the Elm Orlu Case, establishes the three following propositions:

1. That failure to comply with a minor requirement of a state statute concerning the notice of location of a mining claim does not result in a forfeiture of the claim where there was actual knowledge of the existence of the location;

2. That issuance of patent to the conflict area embraced within two conflicting locations does not necessarily settle the question of seniority;

3. That reserving a portion of the dispute for a subsequent decree does not prevent a decree as to the facts then determinable.

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[16] The Parliament Belge (1880) L. R. 5 Prob. Div. 197.

[17] Young v. S. S. Scotia (1903) A. C. 501.

[18] The Parliament Belge, supra, n. 19; Vavasseur v. Krupp (1877) 9 Ch. D. 351; see also The Siren (1868) 7 Wall. 152, 19 L. Ed. 129.

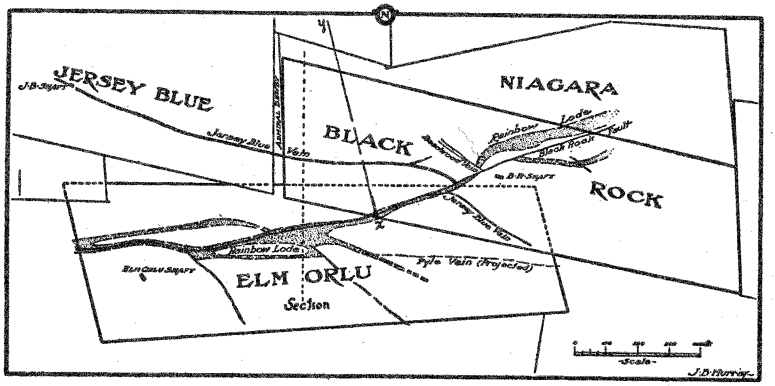
[19] Supra, note 3, at p. 244.

[20] See The Crimdon (Prob. Div. 1918) 35 T. L. R. 81, 82-83: ". . . . the inconveniences, and in some degree the dangers resulting from immunity from arrest are, in my humble judgment, very considerable.

"It is in my view a great hardship upon the persons who have claims against such privately-owned vessels [in Government use] that they should lose their most substantial remedy; and in the interest of safe navigation it is most unfortunate that there should be a great number of vessels navigating the seas whose owners know that however negligently they may be navigated no maritime lien can be enforced upon the vessel while she is in State employment."

[1] (March 3, 1919) 10 U. S. Supreme Court Advance Opinions 295.

In the principal case, the facts were briefly as follows: Plaintiffs owned the Elm Orlu claim and defendants were owners of the Black Rock claim, the latter being northeast of, and adjacent to, the former. The Elm Orlu was the prior location, having been located and recorded in April, 1875, while the location and recordation of the Black Rock was made in November, 1875. The Black Rock patent, however, was granted first. The main vein in dispute, the Rainbow lode, entered the Elm Orlu claim through its west end-line and crossed the common side line of the two claims in a northeasterly direction.[2] The



appellants (defendants below) the Butte and Superior Copper Company, contended that since the appellees had not complied with the Montana state statute, in that the verification of their location certificate was defective, the Elm Orlu location could only be considered valid as of the date of its patent, when the usual presumption as to the validity of the location on which the patent was based arose. Having received a patent prior to that of the appellees, it was contended that the Black Rock claim must be considered the senior. The court, however, repudiated this contention, in view of the fact that the Elm Orlu owners were in possession and working their claim at the time of the Black Rock location and the locators of the latter knew that fact. While the courts in the past have not been in entire harmony on this question,[3] the general rule accords with that of the principal case;[4] and where a person attempts to locate a mining claim already in the possession of another, the latter's location will not

[2] See diagram.

[3] Accord; Emerson v. McWhirter (1901) 133 Cal. 510, 65 Pac. 1036; contra, King v. Edwards (1870) 1 Mont. 235; Hickey v. Anaconda Copper Mining Co. (1905) 33 Mont. 46, 81 Pac. 806. But see Laws of Montana, 1907, ch. C-16, Sec. 11, where by statute the majority rule has been adopted in that state.

[4] Yosemite Mining Co. v. Emerson (1908) 208 U. S. 25, 52 L. Ed. 374, 28 Sup. Ct. Rep. 196; Johnson v. McLaughlin (1884) 1 Ariz. 493, 4 Pac. 130.

be declared void merely because of a minor defect in the posting or recording of his location notice, unless the statute explicitly so provides. The law is as reluctant in such a case to enforce a forfeiture as it is in other cases.[5] There is, or at least should be, a reasonable limit to this rule. It would seem, however, that the California Supreme Court in the recent case of Stock v. Plunkett[6] has gone far toward rendering nugatory state statutory requirements as to posting notice. In that case a party attempted to locate a piece of land having an undated location notice posted thereon, which notice had not been recorded. In an ejectment suit, the prior locator who relied on the undated and unrecorded notice prevailed. No one was in possession or working the claim at the time of the subsequent attempted location. The statute in California provides that a location notice must be dated and also that a copy thereof must be recorded,[7] but does not declare the location void for a failure to comply with these requirements. The court in the prevailing opinion expressed the view that by noting the posted notice the subsequent locator was placed on notice and it was incumbent on him to ascertain the date of the location. As Justice Olney pointed out in a vigorous dissenting opinion,[8] the locator had not even recorded his notice, so there was no chance of obtaining any knowledge from that source and the first locator might be a roving prospector. It would seem as if the court had placed an unreasonable burden upon the subsequent locator and ignored the value of and necessity for reasonable state regulations. Where a party has actual notice that a live claim is being worked, as where the claimant is in possession, or where a record of the claim is available for examination, a different consideration, of course, applies; a minor defect then is of little material importance.

The second ground on which the defendants in the Elm Orlu case relied in claiming that their location had priority over the plaintiff's claim was that the plaintiff had, at the time of application for the Black Rock patent, failed to adverse the area in conflict. Of course, if a party adverses only part of a claim applied for, any right he may have to the rest of that claim is conclusively presumed[9] to be waived.[10] As the court said, in

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[5] 1 Lindley on Mines, § 274.

[6] (1919) 58 Cal. Dec. 242, the San Francisco Recorder, Sept. 11, 1919.

[7] Cal. Civ. Code, §§ 1426, 1426b.

[8] Supra, n. 6.

[9] In Lavagnio v. Uhlig (1903) 26 Utah 1, 71 Pac. 1046, the words "it shall be assumed" in Rev. Stats. U. S., § 2325, providing that on expiration of 60 days after publication of the notice "it shall be assumed that the applicant is entitled to a patent . . .," were construed to mean "conclusively assumed."

[10] Lily Mining Co. v. Kellogg (1903) 27 Utah 111, 74 Pac. 518.

Marshall Silver Mining Co. v. Kirtley,[11] an action brought in support of such adverse claim (speaking of an adverse proceeding under the mining law of 1872) must be based upon the right asserted in such claim, for the reason that it must be conclusively assumed that no adverse claim exists, except such as has been filed.

But take a situation such as presented itself in the principal case. There were two adjacent claims with an area, common to both, in conflict. Since plaintiffs failed to adverse and defendants obtained a patent to their entire claim, it is obvious that plaintiffs lost all their rights to the area in conflict. But what effect did that have on the remaining area in plaintiff's location and concerning which there was no conflict? Did that bar plaintiffs from contesting the question of priority as claimed by defendants? Defendants' contention that it did create a bar was considered the general rule[12] until 1907 when the United States Supreme Court[13] laid down the principle that in such a case nothing is decided in the adverse suit save the particular question in issue, viz.: right of possession to the conflict area, and that such a suit does not bar either party from showing as a matter of fact that his claim is prior in time to the other claim. This it would seem is the correct rule, since nothing except the question of surface ownership in the portion in conflict should be decided in such an adverse suit. While the adverse claimant is barred, after a decision against him, from later claiming any rights as to land claimed by the other party and not claimed by him, he should not be barred from asserting his rights concerning his remaining land not claimed by the other party in the suit.

The two propositions thus far discussed concern the question of priority. Wherever there is a dispute between adjacent claimants, the question of priority is usually paramount. Important extra-lateral rights may, however, inure to the party establishing priority. Where the apex of a vein is bisected by a common side line, the party whose claim is prior in time acquires complete extra-lateral rights to that segment of the vein;[14] and if veins apexing in each claim unite on the dip, the prior claimant has complete extra-lateral rights below the junction.[15] In this case the plaintiffs, having established priority and also a continuity

[11] (1889) 12 Colo. 410, 21 Pac. 492.

[12] Empire Idaho M. & D. Co. v. Bunker Hill and Sullivan M. & C. Co. (1902) 114 Fed. 420, 52 C. C. A. 222.

[13] Lawson v. U. S. Mining Co. (1907) 207 U. S. 1, 52 L. Ed. 65, 28 Sup. Ct. Rep. 15.

[14] Supra, n. 12.

[15] Rev. Stats. U. S. § 2336. Champion Mining Co. v. Consolidated Wyoming G. M. Co. (1888) 75 Cal. 78, 16 Pac. 513; Consolidated Wyoming M. Co. v. Champion Mining Co. (1894) 63 Fed. 540; Roxanna G. M. etc. Co. v. Cone, (1899) 100 Fed. 168.

of vein between their Rainbow apex and the ore bodies in the defendants' claim, were awarded extra-lateral rights measured by a vertical plane parallel to the Elm Orlu end lines and constructed at the most easterly point of crossing of the common side line by the vein apex, giving plaintiffs the maximum amount of vein.

Coming now to the third point established in this case, both parties desired a determination of the position within the Elm Orlu claim of the apex of a certain vein (known as the "Pyle Strand") and also what extra-lateral rights, if any, attached thereto. But since these facts were then impossible of ascertainment because of lack of physical development and exposure by mine openings, the court only entered a decree for that portion of the veins then exposed and reserved a determination of the rights on the Pyle Strand for a future decree. This position of the Pyle Strand could, of course, be only ascertained by future development.[16] From the very nature of the case, it can be seen that the court could reach no other decision.[17] What it amounted to was a mere retention of the case for supplementary proceedings. A court of equity will often do that, sometimes from public consideration,[18] and sometimes merely in order to carry out its decree under altered circumstances.[19]

H. S. J.

VENDOR AND PURCHASER: DEFAULT OF VENDEES: RIGHT OF VENDEES TO MONEY PAID.—In the case of *Gaume v. Sheets*,[1] a vendee in default under an installment contract for the sale of land, was allowed to recover money paid, because under the facts of the case the notice given by the vendor was held to be a repudiation of the contract, wherefore the vendee was allowed to rescind.

The contract was an ordinary installment contract for the sale of land, making time of the essence, and containing the special provision that on default of the vendee, the vendor should upon sixty days' notice in writing be released from all obligations in law and equity to convey the property, and that the vendee should forfeit all rights in the property and all moneys paid under the contract. On April 10, 1916, the vendee made default in a payment, and on April 28th the vendor sent a notice to the vendee informing him that he had made default in the payments

[16] The parties have since, after an expensive trial, settled the reserved question by compromise decree.

[17] Keely v. Ophir Hill M. Co. (1909) 169 Fed. 601.

[18] Joy v. U. S. (1890) 138 U. S. 1, 34 L. Ed. 843, 11 Sup. Ct. Rep. 243.

[19] Lefman v. Brill (1905) 142 Fed. 44, 73 C. C. A. 230; Hamlin v. R. R. Co. (1900) 176 Mass. 514, 57 N. E. 1006; Louisville & N. R. Co. v. R. R. Commission (1913) 205 Fed. 800.

[1] (Aug. 25, 1919) 58 Cal. Dec. 171.